

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

Parole Administrative Appeal Decisions

Parole Administrative Appeal Documents

---

June 2023

### Administrative Appeal Decision - Allende, Richard (2019-08-09)

Follow this and additional works at: <https://ir.lawnet.fordham.edu/aad>

---

#### Recommended Citation

"Administrative Appeal Decision - Allende, Richard (2019-08-09)" (2023). Parole Information Project  
<https://ir.lawnet.fordham.edu/aad/1472>

This Parole Document is brought to you for free and open access by the Parole Administrative Appeal Documents at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Parole Administrative Appeal Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Allende, Richard

Facility: Clinton CF

NYSID: [REDACTED]

Appeal Control No.: 11-119-18 B

DIN: 07-A-6281

Appearances: James Godemann Esq.  
Oneida County Public Defender  
250 Boehlert Center at Union Station  
321 Main Street  
Utica, New York 13501

Decision appealed: November 2018 decision, denying discretionary release and imposing a hold of 24 months.

Board Member(s) who participated: Davis, Alexander

Papers considered: Appellant's Brief received May 17, 2019

Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

Records relied upon: Pre-Sentence Investigation Report, Parole Board Report, Interview Transcript, Parole Board Release Decision Notice (Form 9026), COMPAS instrument, Offender Case Plan.

Final Determination: The undersigned determine that the decision appealed is hereby:

Affirmed     Vacated, remanded for de novo interview     Modified to \_\_\_\_\_

Commissioner

Affirmed     Vacated, remanded for de novo interview     Modified to \_\_\_\_\_

Commissioner

Affirmed     Vacated, remanded for de novo interview     Modified to \_\_\_\_\_

Commissioner

**If the Final Determination is at variance with Findings and Recommendation of Appeals Unit, written reasons for the Parole Board's determination must be annexed hereto.**

This Final Determination, the related Statement of the Appeals Unit's Findings and the separate findings of the Parole Board, if any, were mailed to the Inmate and the Inmate's Counsel, if any, on 8/9/19.

Distribution: Appeals Unit – Appellant - Appellant's Counsel - Inst. Parole File - Central File P-2002(B) (11/2018)

STATE OF NEW YORK – BOARD OF PAROLE

**APPEALS UNIT FINDINGS & RECOMMENDATION**

**Name:** Allende, Richard

**DIN:** 07-A-6281

**Facility:** Clinton CF

**AC No.:** 11-119-18 B

**Findings:** (Page 1 of 4)

---

Appellant challenges the November 2018 determination of the Board, denying release and imposing a 24-month hold. Appellant's instant offense consists of him repeatedly stabbing his defenseless estranged wife, causing her death, while he was on parole. Appellant raises the following issues: 1) the decision is arbitrary and capricious in that the Board failed to consider and/or properly weigh the required statutory factors. 2) no aggravating factors exist. 3) the decision illegally resentenced him. 4) the Board never explained how they weighed the factors. 5) the Board failed to provide any facts in support of the statutory standard cited. 6) the 24 month hold is excessive.

Discretionary release to parole is not to be granted “merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, **and** that his release is not incompatible with the welfare of society **and** will not so deprecate the seriousness of his crime as to undermine respect for the law.” Executive Law § 259-i(2)(c)(A) (emphasis added); accord Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). Executive Law § 259-i(2)(c)(A) requires the Board to consider criteria which is relevant to the specific inmate, including, but not limited to, the inmate's institutional record and criminal behavior. People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983). While consideration of these factors is mandatory, “the ultimate decision to parole a prisoner is discretionary.” Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000). Thus, it is well settled that the weight to be accorded the requisite factors is solely within the Board's discretion. See, e.g., Matter of Delacruz v. Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4th Dept. 2014); Matter of Hamilton, 119 A.D.3d at 1271, 990 N.Y.S.2d at 717; Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239, 657 N.Y.S.2d 415, 418 (1st Dept. 1997). The Board need not explicitly refer to each factor in its decision, nor give them equal weight. Matter of Betancourt v. Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315 (3d Dept. 2017); Matter of LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

“[A]fter giving due consideration to the statutory factors, the Parole Board denied the petitioner's application to be released to parole based on the seriousness of the offense, his multiple disciplinary violations while incarcerated, and the petitioner's criminal history, with particular attention to the fact that he committed the underlying crime while on parole, and that he had displayed an escalation of unlawful activities. Thus, the Parole Board's determination was not based on “irrationality bordering on impropriety.” Matter of Stanley v. New York State Div. of Parole, 92 A.D.3d 948, 948-49, 939 N.Y.S.2d 132, 134 (2d Dept.) (citations omitted), lv. denied, 19 N.Y.3d 806, 949 N.Y.S.2d 343 (2012).

STATE OF NEW YORK – BOARD OF PAROLE

**APPEALS UNIT FINDINGS & RECOMMENDATION**

**Name:** Allende, Richard

**DIN:** 07-A-6281

**Facility:** Clinton CF

**AC No.:** 11-119-18 B

**Findings:** (Page 2 of 4)

---

The fact that the inmate committed the instant offense while on community supervision is a proper basis for denying parole release. See, e.g., Matter of Byas v. Fischer, 120 A.D.3d 1586-87, 1586, 992 N.Y.S.2d 813, 814 (4th Dept. 2014); Matter of Thompson v. New York State Bd. of Parole, 120 A.D.3d 1518, 1518-19, 992 N.Y.S.2d 464, 465 (3d Dept. 2014); Matter of Guzman v. Dennison, 32 A.D.3d 798, 799, 821 N.Y.S.2d 208, 208 (1st Dept. 2006).

The Board may emphasize the nature of the instant offense and that it was an escalation in illegal behavior. See Matter of Stanley v. New York State Div. of Parole, 92 A.D.3d 948, 948-49, 939 N.Y.S.2d 132, 134 (2d Dept.), lv. denied, 19 N.Y.3d 806, 949 N.Y.S.2d 343 (2012); Matter of Symmonds v. Dennison, 21 A.D.3d 1171, 1172, 801 N.Y.S.2d 90, 90 (3d Dept.), lv. denied, 6 N.Y.3d 701, 810 N.Y.S.2d 415 (2005); Matter of Warren v. New York State Div. of Parole, 307 A.D.2d 493, 493, 761 N.Y.S.2d 883 (3d Dept. 2003); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239-40, 657 N.Y.S.2d 415, 418 (1st Dept. 1997).

The fact that the Board afforded greater weight to the inmate's criminal history, as opposed to other positive factors, does not render the denial of parole for that reason irrational or improper. Matter of Davis v. Evans, 105 A.D.3d 1305, 963 N.Y.S.2d 485 (3d Dept. 2013); Matter of Lashway v. Evans, 110 A.D.3d 1417, 1418, 974 N.Y.S.2d 164, 165 (3d Dept. 2013); Matter of McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 550 N.Y.S.2d 204 (3d Dept. 1990).

The Board may consider an inmate's failure to comply with DOCCS rules in denying parole. See Matter of Almonte v. New York State Bd. of Parole, 145 A.D.3d 1307, 42 N.Y.S.3d 691 (3d Dept. 2016), lv. denied, 29 N.Y.3d 905 (2017); Matter of Karlin v. Cully, 104 A.D.3d 1285, 1286, 960 N.Y.S.2d 827, 828 (4th Dept. 2013); Matter of Stanley v. New York State Div. of Parole, 92 A.D.3d 948, 948-49, 939 N.Y.S.2d 132, 134 (2d Dept.), lv. denied, 19 N.Y.3d 806, 949 N.Y.S.2d 343 (2012).

The Board may consider negative aspects of the COMPAS instrument. Matter of Espinal v. New York Bd. of Parole, 2019 NY Slip Op 04080, 2019 N.Y. App. Div. LEXIS 4057 (3d Dept. May 23, 2019) (COMPAS instrument yielded mixed results); Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017) (COMPAS instrument with mixed results including substance abuse relevant given use before crime); Matter of Wade v. Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017) (low risk felony violence but probable risk for substance abuse alcohol related crimes); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016) (scores not uniformly low including family support), lv. denied, 29 N.Y.3d 901, 57 N.Y.S.3d 704 (2017).

T]here is a strong rehabilitative component in the statute that may be given effect by considering insight." Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000).

STATE OF NEW YORK – BOARD OF PAROLE

**APPEALS UNIT FINDINGS & RECOMMENDATION**

**Name:** Allende, Richard

**DIN:** 07-A-6281

**Facility:** Clinton CF

**AC No.:** 11-119-18 B

**Findings:** (Page 3 of 4)

---

Insight is relevant not only to rehabilitative progress but also to whether release would deprecate the severity of the offense. Matter of Phillips v. Dennison, 41 A.D.3d 17, 23, 834 N.Y.S.2d 121, 125 (1st Dept. 2007); Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002) (limited insight into why crime committed).

The Board may place greater weight on the nature of the crime without the existence of any aggravating factors. Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014).

The inmate may not review the Board's weighing process or assess whether the Board gave proper weight to the relevant factors, since it is not required to state each factor it considers, or weigh each factor equally or grant parole due to exemplary behavior. Comfort v New York State Division of Parole, 68 A.D.3d 1295, 890 N.Y.S.2d 700 (3<sup>rd</sup> Dept. 2009); Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). The due process clause is not violated by the Board's balancing of the statutory criteria, and which is not to be second guessed by the courts. Mathie v Dennison, 2007 WL 2351072 (S.D.N.Y. 2007); MacKenzie v Cunningham, 2014 WL 5089395 (S.D.N.Y. 2014).

That the Board "did not recite the precise statutory language of Executive Law § 259-i (2)(c)(A) in support of its conclusion to deny parole does not undermine its conclusion." Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 1142, 25 N.Y.S.3d 698 (3d Dept. 2016) (citation omitted); accord Matter of Reed v. Evans, 94 A.D.3d 1323, 942 N.Y.S.2d 387 (3d Dept. 2012). The language used by the Board was "only semantically different" from the statute. Matter of Miller v. New York State Div. of Parole, 72 A.D.3d 690, 691–92, 897 N.Y.S.2d 726, 727 (2d Dept. 2010); Matter of James v. Chairman of New York State Div. of Parole, 19 A.D.3d 857, 858, 796 N.Y.S.2d 735, 736 (3d Dept. 2005); see also People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983) (upholding decision that denied release as "contrary to the best interest of the community"); Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011) (Board provided adequate statutory rationale).

Appellant's assertion that the denial of parole release amounted to an improper resentencing is without merit inasmuch as the Board fulfilled its obligation to determine the propriety of release per Executive Law § 259-i(2)(c)(A) and after considering the factors set forth therein. Executive Law § 259 et seq.; Penal Law § 70.40; Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011); Matter of Crews v. New York State Exec. Dept. Bd. of Parole Appeals Unit, 281 A.D.2d 672, 720 N.Y.S.2d 855 (3d Dept. 2001). The Board was vested with discretion to determine whether release was appropriate notwithstanding the minimum period of incarceration set by the Court. Matter of Burress v. Dennison, 37 A.D.3d 930, 829 N.Y.S.2d 283 (3d Dept. 2007); Matter of Cody v. Dennison, 33 A.D.3d 1141, 1142, 822 N.Y.S.2d 677 (3d Dept. 2006), lv.

STATE OF NEW YORK – BOARD OF PAROLE

**APPEALS UNIT FINDINGS & RECOMMENDATION**

**Name:** Allende, Richard

**DIN:** 07-A-6281

**Facility:** Clinton CF

**AC No.:** 11-119-18 B

**Findings:** (Page 4 of 4)

---

denied, 8 N.Y.3d 802, 830 N.Y.S.2d 698 (2007). The appellant has not in any manner been resentenced. Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 1142, 25 N.Y.S.3d 698 (3d Dept. 2016).

Denial of parole is neither arbitrary nor capricious when the Parole Board relied on the factors defined by the New York statute. Hodge v Griffin, 2014 WL 2453333(S.D.N.Y. 2014) citing Romer v Travis, 2003 WL 21744079. An arbitrary action is one without sound basis in reason and without regard to the facts. Rationality is what is reviewed under an arbitrary and capricious standard. Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. Ward v City of Long Beach, 20 N.Y.3d 1042 (2013). Denial is neither arbitrary nor capricious when the Board relies on factors defined by New York statute. Siao-Paul v. Connolly, 564 F. Supp. 2d 232, 242 (S.D.N.Y. 2008); Hanna v New York State Board of Parole, 169 A.D.3d 503, 92 N.Y.S.3d 621 (1<sup>st</sup> Dept. 2019).

In the absence of a convincing demonstration that the Board did not consider the statutory factors, it must be presumed that the Board fulfilled its duty. Matter of Fuchino v. Herbert, 255 A.D.2d 914, 914, 680 N.Y.S.2d 389, 390 (4th Dept. 1998); Matter of McLain v. New York State Div. of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept. 1994); Matter of McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 945, 550 N.Y.S.2d 204, 205 (3d Dept. 1990); People ex rel. Herbert, 97 A.D.2d 128, 468 N.Y.S.2d 881.

The Board's decision to hold an inmate for the maximum period of 24 months is within the Board's discretion and within its authority pursuant to Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(b). Matter of Tatta v. State of N.Y., Div. of Parole, 290 A.D.2d 907, 737 N.Y.S.2d 163 (3d Dept. 2002), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); see also Matter of Campbell v. Evans, 106 A.D.3d 1363, 965 N.Y.S.2d 672 (3d Dept. 2013). In the absence of impropriety, the reconsideration date set by the Board will not be disturbed. Matter of Tatta v. State of N.Y., Div. of Parole, 290 A.D.2d 907, 908, 737 N.Y.S.2d 163 (3d Dept. 2002); accord Matter of Evans v. Dennison, 13 Misc. 3d 1236(A), 831 N.Y.S.2d 353 (Sup. Ct. Westchester Co. 2006) (rejecting challenge to 24-month hold). Appellant has failed to demonstrate that a hold of 24 months for discretionary release was excessive or improper.

**Recommendation:** Affirm.